No. 6872

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EDGAR D. ROSENBERG, HELEN ROSENBERG KAHN and CLAUDE N. ROSENBERG,

Appellants,

vs.

JOHN V. LEWIS, Collector of Internal Revenue for the First District of California, substituted as the party appellee in place of John P. McLaughlin, formerly Collector of Internal Revenue for said District,

Appellee.

APPELLANTS' PETITION FOR A REHEARING.

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APPELLANTS' PETITION FOR A REHEARING.

To the Honorable Curtis D. Wilbur, Presiding Judge, the Honorable William H. Sawtelle, Associate Judge, and Honorable Francis A. Garrecht, Associate Judge, Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The appellants request a rehearing in this case because they believe that this Court has fallen into grievous error regarding certain propositions of law upon which it bases its decision and, in addition, has misapprehended and not thoroughly considered the facts essential to a correct decision.

STATEMENT.

In making this petition appellants are not challenging that portion of the decision which holds that the Collector was not restricted by Sections 316 (a) and 308 (a) of the Revenue Act of 1926 to the determination of the liability of appellants as transferees, although we believe the decision in error on that point and reserve the right to challenge the decision on that issue if it becomes necessary to appeal.

This petition is specifically directed to that part of the decision which denies appellants' injunctive relief under the facts alleged in the bill of complaint, which holds that Section 409 of the Revenue Act of 1921 provides a definite and continuing lien against property which was once a part of the estate of Isidore Rosenberg, regardless of the fact that the estate tax shown on the return was duly paid before the due date therefor, and no additional tax was found until long after the estate had been distributed, which entirely ignores the statutory provisions of the Revenue Acts of 1924 and 1926 which supersede the provisions of the Revenue Act of 1921, and which denies injunction against the Collector, where his actions are tacitly admitted to be in error by appellee and are ignored by the Court in its decision.

Furthermore, this petition is filed in order that this Court may have the opportunity of correcting what we believe to be serious errors and unsound conclusions made in its decision, rather than to seek review by the Supreme Court.

GROUNDS FOR REHEARING.

1. The decision rendered provides a lien for estate taxes that is novel and unsupported by the authorities relied upon by appellee and by the Court and therefore deserves a most thorough reconsideration by the Court. The decision declares principles of general application and of great public importance, because it subjects all distributees of estates to possible loss of their property by seizure and sale without due process under the concealed and unascertainable liens which the decision warrants or creates. Even the title of purchasers of property for value from distributees is placed in danger by the decision. Such a lien as the decision declares to exist is not a matter of record, is not affected by payment of the tax shown on the return or subsequently determined, and apparently requires no notice of lien to be filed by the Collector, regardless of the fact that an estate has been distributed. Such a lien may be protracted to the limit of the ten year period declared by the Court through failure of the Commissioner to determine any additional tax. The extended continuance of such an indefinite lien as the decision declares will work unwarranted hardship on distributees, by rendering it difficult to sell, mortgage or pledge their properties, because the lien is not provided by any statute in force, it is not required that the liability of distributees as transferees be determined, and seizure and sale seems to be warranted against any person owning the property at the time the Collector acts within the ten year period upon the Commissioner's unreviewable declaration that more tax than that paid is due from the estate.

2. The question stated by the Court on page 3 of its printed decision as the only remaining question to be solved, viz.: "Is there a valid and subsisting lien upon the property enforceable by distraint?", discloses a complete misunderstanding of the issue presented in the bill of complaint. The issue upon which the injunction was sought is: *May the Collector seize and sell the property belonging to appellants under the proceedings complained of, when no tax liability has been determined against them and the Commissioner has refused to take the necessary statutory steps to determine whether they are liable?* (See Appellants' Brief, pp. 5, 6; Appellants' Reply Brief, p. 1.) Furthermore, after erroneously stating the issue, the decision says: "It is conceded that if such a lien attached to the property it arose under Section 409 of the Revenue Act of 1921." *This is a mistake.* (See Appellants' Reply Brief, pp. 3 to 6.) Appellants never conceded that Section 409 of the Revenue Act of 1921 had any application to the additional tax determined by the Board of Tax Appeals, the assessment of the deficiency by the Commissioner, the demand made on the administrator, the issuance of the warrant of distraint, or the attempt to levy upon the property of appellants. To the contrary appellants have insisted that the Collector had no authority to do anything under Section 409 (supra). A correct decision can never be made upon an incorrect conception of issues, facts, or law.

3. That part of the decision of this Court on which rehearing is sought is founded upon a non-existent

issue and a concession which was never made, and therefore is wholly erroneous in its conclusions.

4. By denial of the injunction sought by the appellants; by ignoring the fact that the Commissioner of Internal Revenue elected to proceed under Section 308 (a) of the Revenue Act of 1926 and determined a deficiency thereunder and thereon caused assessment, demand for payment, and issuance of warrant of distraint to be made against the administrator of the estate of Isidore Rosenberg, deceased; by ignoring the distinction between "the tax" as shown by the return and the "additional tax" or "deficiency" provided in the Revenue Acts of 1921, 1924 and 1926; by ignoring the fact that the "deficiency" determined by the Commissioner, which affords the real issue in this case, consisted partially of an additional tax and partly of an erroneous refund; by ignoring the fact that the Revenue Act of 1921 contains no provision for recovering an erroneous refund or treating it as a tax and by ignoring all of the estate tax provisions of the Revenue Acts of 1924 and 1926, this Court has determined a lien to exist which is not provided for in any statute and which is contrary to law. (See Appellants' Reply Brief, pp. 11-22.)

5. The decision is legislative in character in that it provides a lien without regard to specific applicable statutes and of uncertain character which the Collector may enforce against appellants by seizure and sale, without restriction of prohibitive statutes and without regard to the fact that appellants are not taxpayers and have never been determined to be liable

for any tax or deficiency due from the estate of Isidore Rosenberg, deceased.

6. The decision in this case in effect annuls the decision of the Board of Tax Appeals in *Rosenberg v. Commissioner,* 14 B. T. A. 1340, under which the Commissioner made the assessment and the Collector issued the warrant of distraint, the enforcement of which is the cause for filing the bill of injunction in this case, in the following particulars:

(a) The decision ignores the fact that the proceeding before the Board was brought under the only statutory provision open to the Commissioner (Sections 307 and 308 of the 1926 Act, which are the comparative sections to Section 407 of the 1921 Act) for any assessment, collection or distraint on account of an additional tax.

(b) By holding that there is a method of enforcement by distraint under the Revenue Act of 1921 or Sections 3187 and 3188, U. S. Revised Statutes, of a tax deficiency determined after the 1926 Act became effective, other than by compliance with Section 308 (a) of the 1926 Act.

(c) By holding that Section 409 of the 1921 Act or R. S. Sections 3187 and 3188 provide the lien which may be enforced against appellants, the Court ignores the fact that there is no provision in the 1921 Act for a lien for an erroneous refund and the fact that only the Revenue Acts of 1924 and 1926 provide for adding an erroneous refund to a deficiency in tax. The actual deficiency in tax has been paid (R. 10, 11), so that

nothing remains unpaid but the erroneous refund and no lien exists for that under Section 409. The decision therefore erases all liability of appellants.

(By failure to grant appellants' prayer for injunction to prevent distraint under the existing ineffective warrant, the foregoing effect of the decision of this Court is the only one we can conceive.)

7. The decision of the Court ignores the clean cut distinction between Sections 407 and 409 of the Revenue Act of 1921. Section 407 relates to an "additional tax" found after "the amount of a tax" shown on a return made in good faith "has been fully paid" and provides its own method of collection and for a lien distinct from that provided in Section 409. Therefore, considering the Estate Tax Title of the Act as a whole, Section 409 can be said to provide a lien only for "the tax" shown on the return. The sections of the Estate Tax title can not be isolated and one deprived of meaning in order to give another a broader effect. Certainly Congress would not have provided a separate lien for "additional taxes" if it contemplated that the lien for "the tax" should operate for additional taxes, nor can it be expected that Congress intended that an additional tax should be protected by two liens—one for a ten year period and the other for an unlimited period. On examination of the comparative sections of the Revenue Acts of 1924 and 1926 it shows the intention of Congress to be to the contrary. (Cf. Sections 307 and 308 of the 1924 and 1926 Acts with Section 407 of the 1921 Act, and Sec-

tion 315 of the 1924 and 1926 Acts with Section 409 of the 1921 Act; which are to be found in the Appendix to Appellants' Brief. See *Oesterlein Machine Co.,* 1 B. T. A. 159, 161.)

8. The decision ignores the fact that Section 308 (a) of the Revenue Act of 1926 provides the only method for the recovery of the additional tax determined against the estate of Isidore Rosenberg by the Commissioner on September 25, 1926. (See Section 318 (a), Revenue Act of 1926.) Without resorting to that remedy, no lien, distraint or proceeding in Court might be had to enforce payment of the tax liability asserted.

9. The decision ignores the fact that, though Section 316 (a) of the 1926 Act may not be the exclusive remedy against transferees, it nevertheless bars assessment and distraint against transferees (such as appellants) if the Commissioner fails to resort to such section to enforce the liability of transferees. The Commissioner may waive his right to pursue a transferee under the section and resort to the Courts to collect from him, but he cannot thereby avoid the prohibition of distraint. (See Appellants' Reply Brief, pp. 20-22; *Michael v. Commissioner,* 22 B. T. A. 639, 642, 643.)

10. The decision errs in holding that the Collector has the power to seize and sell the property of appellants for any tax or deficiency due from the estate of Isidore Rosenberg, under the provisions of Revised Statutes, Sections 3187 and 3188, by virtue of the asserted continuing lien alleged to be created by Sec-

tion 409 of the Revenue Act of 1921 or by the lien which the decision seeks to create, for the following reasons:

(a) Until appellants are held to be liable as transferees for the asserted tax liability, and demand and notice for the payment of a transferee liability has been made upon them and they then refuse to pay the tax liability, no lien can be enforced against them or warrant of distraint issued under Sections 3186, 3187 and 3188, U. S. Revised Statutes (26 U. S. C. A. Sections 115, 116 and 117). (*Michael v. Commissioner,* 22 B. T. A. 639, 642.)

(b) Appellants have never been adjudicated to be liable for any part of any tax which may be due from the estate of Isidore Rosenberg, nor has any demand or notice to pay any determined transferee liability been made upon them or any of them.

(c) Distraint, seizure and sale of the property of appellants is forbidden by Sections 316 (a) and 308 (a) of the Revenue Act of 1926, unless the Commissioner elects to have their liability as transferees determined in accordance with those sections, and, as he has not done so the provisions of Sections 3186, 3187 and 3188 are not applicable against your appellants. (*Michael v. Commissioner,* 22 B. T. A. 639, 642, 643.) The decisions relating to transferee proceedings before the Board hold only that the remedy of suit for recovery against transferees is not barred. See-

tion 316 is an alternative remedy, and the Courts have in no way limited or held improper the restrictions on distraint, seizure and sale provided therein.

12. The decision is in direct conflict with *Phillips v. Commissioner,* 283 U. S. 589, 597; *Lion Coal Co. v. Anderson,* 62 Fed. (2d) 325, 328; *United States v. Garfunkel,* 52 Fed. (2d) 727, 729, and other decisions of Federal Courts in holding that a tax liability may be enforced against a transferee of the taxpayer's property by distraint without proceedings being taken under Sections 316 (a) and 308 (a) of the 1926 Act. The cumulative remedy, suit in equity, does not contemplate a lien or distraint. No suit has been brought in this case.

13. The decision is in direct conflict with *Dreyfuss Dry Goods Co. v. Lines,* 24 Fed. (2d) 29, 31, in holding that Section 3187, U. S. Revised Statutes, contemplates the distraint and sale of property belonging to any one else than the delinquent taxpayer (which in this case was the estate of Isidore Rosenberg, deceased).

14. The decision is in direct conflict with *United States v. Cruickshank,* 48 Fed. (2d) 352, 356 and 357, in holding, contrary to the provisions of Section 318 (a), that the Revenue Act of 1926 does not absorb and thereby repeal Section 409 of the Revenue Act of 1921.

15. That unless it intended to reverse the decision in *Kelley v. United States,* 30 Fed. (2d) 193, the

decision of this Court is in direct conflict with that case, which properly held that "When once paid, a tax is gone" and lien against the property is discharged. While the Kelley decision held that a refund would not restore the lien, it is equally true that the finding of an additional tax would not restore it under Section 409 of the 1921 Act or the similar provisions of subsequent acts, because a special lien with a special method of collection is provided for additional taxes or deficiencies. (Sec. 407, Act of 1921; Sec. 308 (b), 1926 Act.) The Court should bear in mind that the *Kelley* case was a suit to recover an erroneous refund under the alleged authority of Section 409 of the 1918 Act (which is identical with Section 409 of the 1921 Act herein involved) and on the assumption that there was a lien under that section the United States brought suit. The Court held that there was no lien and recovery could not be had on the theory that a lien existed. Also, it should be borne in mind that in its decision in this case the Court has ignored the decision of the Board of Tax Appeals and, therefore, in apparently holding that Section 409 is warrant for the lien in this case, it is recognizing that only the amount of an erroneous refund is involved in this case. Therefore, as the Court declared in the *Kelley* case, there can be no existent lien under Section 409.

16. The decision is in direct conflict with *Levy v. Commissioner,* 48 Fed. (2d) 725. 726, wherein the facts are parallel to those involved in this case, in that the Court therein held that Sections 307 and 308 of the Revenue Act of 1926 were properly applicable to the

enforcement of a deficiency (which included an erroneous refund) although the return was made and the tax paid thereon while the 1921 Act was in force and before the due date therefor prescribed in Sections 406 and 408 of that Act. By that decision this Court held that where the tax shown on the return filed under the 1921 Act was paid before the due date and where the deficiency was not determined until after the 1926 Act went into effect the resort to Sections 307 and 308 was proper. If that decision was correct, and we believe it was, then the decision herein challenged repealed the *Levy* decision, as well as *Rosenberg v. Commissioner* (supra), or else the Court improperly held in this case that Section 409 provided a lien which could be arbitrarily collected without process from any owner (even a purchaser for value) of property which had once been a part of an estate until the ten year period expired. The comment made by the Court in the challenged decision (p. 5) states the fact that the deficiency determined in the *Levy* case "included the amount of the refund does not effect our conclusions". If that statement is now the opinion of the Court, the *Levy* case must fall, because in this case the Court has refused to recognize Section 407 of the 1921 Act, which provided for additional taxes and was the foundation for Sections 307 and 308 of the 1926 Act upon which the *Levy* case was based, and seeks to utilize Section 409 of the 1921 Act as the basis for an undescribable lien of infinite scope, even though that section does not contemplate an erroneous refund and the 1921 Act does not provide that an erroneous refund is part of a tax.

17. The decision is in direct conflict with *Page v. Skinner,* 298 Fed. 731, upon which the decision of this Court relies as a partial basis for the lien which it declares. While we do not admit the applicability of that decision to the case at bar, we submit that, if the Court relies upon the portion of the decision quoted on page 4 of its decision in this case, it must also hold that the lien is enforceable by sale only after proceedings in Court. The Commissioner has refused to resort to any proceedings against appellants except to attempt distraint on the property of appellants on a warrant issued against the administrator, when the liability of appellants for any tax of the estate has never been determined to permit collection from them by any means.

18. The decision is in error in denying that appellants are entitled to injunctive relief for the following reasons:

(a) The only injunctive relief sought by appellants is against the Collector for attempting to sell their property under a warrant of distraint addressed only to the administrator of the estate of Isidore Rosenberg, deceased, and which was issued as a result of assessment and under the specific provisions of Sections 307 and 308 of the Revenue Act, which the decision of this Court entirely ignores.

(b) The Court has ignored the fact that *no* proceedings for distraint under any other provision of any other statute have been taken by the Collector.

(c) The Court has ignored the fact that appellants are distributees (transferees) of the estate of Isidore Rosenberg, deceased, and that they have never been determined to be liable for any tax or deficiency in tax of said estate.

(d) The Court has ignored the fact that appellee has conceded the authority of *Long v. Rassmussen,* 281 Fed. 236, 238, as authority for injunction in this case. Appellants are non-taxpayers and are entitled to relief.

(e) As the Court's present decision is written, appellants are entitled to injunction because the Court does not, and cannot under the issues, determine a transferee liability against appellants.

(f) The entire reasoning of the Court in its opinion does not disclose any warrant for denial of the injunctive relief prayed for. The decision that the property "was impressed with the lien and is subject to seizure and sale" does not abolish the prerequisites for enforcing the lien, i. e. assessment as prescribed in R. S. Section 3182 (26 U. S. C. A., Sec. 102), demand for payment on the person liable to pay the tax as prescribed by R. S. Sections 3186 and 3187 (26 U. S. C. A., Secs. 115 and 116), refusal of the person liable to make payment and issuance of a distraint warrant against him, as prescribed in R. S. Section 3188 (26 U. S. C. A., Sec. 117). Appellants have never been determined to be liable for the tax and, in addition, none of the foregoing prerequisites to enforcement of distraint have been taken

by the Commissioner or Collector. It is this action of the Collector which we seek to restrain and not his lack of action on assumed liens which he has never attempted to enforce.

ARGUMENT.

I. RIGHT TO INJUNCTION.

Appellee has conceded that appellants are entitled to injunctive relief against the Collector for unauthorized trespass upon appellee's property, if they are not liable for the tax (Appellee's Brief, pp. 33 and 34), under his approval of the doctrine laid down in *Long v. Rassmussen,* 281 Fed. 236, 238, and the Court has apparently accepted this concession. (Decision, p. 1.) Should the Court desire to consider the various other grounds which are authority for granting the injunction sought in this proceeding, we refer to pages 27 to 53 of appellants' brief for a complete consideration of that issue.

However, appellee has attached a reservation to the foregoing concession by stating that if "the Collector was seeking to enforce a statutory lien for a deficiency in tax properly assessed, appellants have not made out a case to support this prayer for injunctive relief." This reservation apparently does not find approval by the Court, nor does it conform to the position assumed by appellee in his brief or to any statute.

In his brief, appellee relies entirely upon Section 409 of the Revenue Act of 1921, and its correspond-

ing sections (Section 315) in the Acts of 1924 and 1926, which provide a ten-year lien for *the tax*. (See Appellee's Brief, pp. 7, 15-23.) It should be noted that appellee carefully ignores the effects of Section 407 of the 1927 Act and Section 308 (a) of the 1926 Act. The reservation mentioned above under the exact language contained in the brief does not affect its concession or deprive appellants of their right to injunction. It is well established law that a lien "is not created by law itself, without any action by officers under the law." (*The United States v. The Pacific Railroad,* 1 Fed. 97, 102, 103.)

It matters little to appellants whether a lien arose as a result of the assessment made under Section 308 of the Revenue Act of 1926, or under Section 409 of the Revenue Act, or through the decision of the Court which we seek to review. If any lien existed it could not be attacked until the Collector moved to enforce it. In this case the Collector has moved on only one asserted lien. He filed a notice of lien under the assessment made on the determination of a "deficiency" by the Board of Tax Appeals and by the Collector under Section 308 of the 1926 Act. The notice of deficiency was addressed to the executrix of the estate of Isidore Rosenberg, deceased, the notices and demand for payment were addressed to that estate, the notice of tax lien asserted a lien against the estate, and the warrant of distraint was directed to the estate. In none of these proceedings were appellants named. When all the above mentioned acts were performed there was no property in the estate subject to a lien which the Collector might enforce under Section

308 of the 1926 Act and Revised Statutes, Section 3186 (26 U. S. C. A. 115), the only provisions under which the Collector might act on the determination, assessment and advice of the Commissioner. (*Pool v. Walsh*, 282 Fed. 620, 621; *Livingstone v. Becker*, 40 Fed. (2d) 673, 674, 675; *Long v. Rassmussen*, supra.)

Because the gross estate had vanished and all property had been distributed, the proceedings against the estate of Isidore Rosenberg were ineffective. The lien which the Collector was attempting to enforce was non-existent and of no effect, because it was directed to the estate and the estate had nothing to which the lien might attach. No broader interpretation may be made of this conclusion, because no other assessment has been made, no other demand for and notice of payment has been given, no other distraint warrant issued, and no other notice of lien filed as disclosed by the bill of complaint.

This Court must confine itself to the action of the Collector complained of, and not consider other steps which might be attempted. We seek to enjoin the Commissioner from trespass on the property of appellants in attempting to collect a tax assessed against the estate by sale under distraint warrant issued against the estate, when the property was not a part of the estate and belonged to appellants long before the deficiency sought to be recovered was determined. No lien on the property could exist under these circumstances. This suit is not to restrain assessment or collection of the tax against the estate, but to enjoin trespass upon the property of appellants. The appellants are not taxpayers and have never been deter-

mined to be liable for the tax. This situation places appellants squarely within the provisions of the decision in *Long v. Rassmussen*, 281 Fed. 236, 238, which both the Court and the appellee concede to be adequate authority for the issuance of injunction against appellee. (For further authorities and argument, see Appellants' Brief, pp. 27-53.) It must be remembered that the remedy alternative to that provided in Section 316 of the 1926 Act to hold appellants liable as transferees is a suit in equity under the "equitable trust doctrine." If that doctrine is resorted to the prohibitions against distraint provided in Section 316 remain in force.

II. THE LIEN.

With all respect to the Court, it appears that it has been led to erroneous conclusions, regarding the lien involved and the remedy sought, through over-reliance on appellee's brief, which confuses the issues and omits consideration of the essential elements of statutory law involved. The brief and the decision seek to place appellants in the position of contesting a lien and a tax. As the decision reads, its meaning can be understood only by referring to appellee's brief. The points of importance in appellants' briefs stand ignored and unanswered in the decision. This comment is made with regret, but, because the issues herein involved are of such great public importance, we reluctantly state what appears to be the situation.

There is only one lien before this Court and that one is ineffective, because it could not be impressed on the property of appellants under Section 308 of the

1926 Act, due to the fact that no deficiency in tax was determined until after appellants received their property and that when the tax was found, distraint warrant issued, and lien filed against the estate of Isidore Rosenberg there was nothing in the estate to which a lien could be affixed. The distributees were not taxpayers and the tax could not be collected from them by sale of their properties until they were determined to be liable. (*Lion Coal Co. v. Anderson,* 62 Fed. (2d) 325, 328.) The Commissioner refused to determine them liable. (R. 21.) It was the realization of this fact which probably led appellee to divert the Court's attention from the unenforceable situation and the unlawful attempt to levy from which appellants seek relief by injunction.

Ignoring the unenforceability of the warrant of distraint and the useless lien described above, appellee asserts a lien which he claims to have attached on the date of death, affixed itself fast to the items of property of the estate, and was operative against not only the taxpayer estate, but against all successors to title of the property of the estate which was distributed, for a period of ten years after decedent's death. This asserted lien is in direct conflict with Section 407 of the 1921 Act and Section 308 (a) of the 1926 Act, and is one which would permit levying upon the property of a distributee and even the property of innocent purchasers for value, if during the ten-year period some tax, additional tax or deficiency is found. (See Appellee's Brief, pp. 23 and 24.) From reading the decision is would appear that the Court had adopted this erroneous theory.

As the foundation of this asserted lien appellee relies upon Section 409 of the Revenue Act of 1921, which states

> *"That unless the tax is sooner paid in full, it shall be a lien for ten years* upon the gross estate of the decedent."

The Court holds that the ten years runs from the date of death of a decedent, which we do not believe to be the correct interpretation of the section when it is read in conjunction with Sections 406, 407 and 408. The Court failed to consider these sections in its decision.

Regardless of when the ten-year period commences, there are provisions in Sections 407 and 408 of the 1921 Act which the Court should not ignore, as it did in its decision and as appellee carefully did in his brief. Section 407 must be given careful consideration, because it is the predecessor to Sections 307 and 308 of the 1926 Act under which the proceedings against the estate to recover an additional tax or deficiency were commenced and the distraint warrant herein complained of was issued.

Section 407 provides

> *"That where the amount of tax shown on a return made in good faith has been fully paid* * * * and an *additional amount of tax is* * * * *found to be due,* then such additional amount shall be paid upon notice, and demand by the collector and *if it remains unpaid* * * * shall, until paid, be and *remain a lien* upon the entire gross estate."

Section 407 provides for a tax in addition to that shown on the return, creates a lien of a different character and term than that provided in Section 409, and provides a different method of collection than that provided in Section 408 for the tax shown on the return. Section 407 creates a distinctly different tax from that found in Section 409, and this is emphasized by the third paragraph of Section 407, which provides that: "If the executor files a complete return" and pays *the tax* thereon he is entitled to apply for and receive from the Commissioner a discharge from his personal liability:

> "*Provided, however,* that such discharge shall not operate to release the gross estate from the lien for any *additional tax* that may thereafter be found to be due" * * *.

This quoted portion of Section 407 of the 1921 Act should be read in conjunction with the provision for discharge of the executor from liability found in Section 409 of the same Act, i. e.,

> "If the Commissioner is satisfied that the tax liability of an estate has been fully discharged or provided for, he may, under regulations prescribed by him with the approval of the secretary, issue his certificate, releasing any or all property of such estate from the lien herein imposed."

Why should Sections 407 and 409 provide for alternative releases for the liability of the executor when the release under Section 409 completely discharges the lien, and Section 407 reserves the lien for addi-

tional taxes, if Section 409 contemplates a lien for all taxes as appellee contends?

A reading of the foregoing provisions of Section 407 and then referring to Section 409 is convincing that Section 409 applies only to the tax shown on the return, and, when the returned tax is paid no lien continues under Section 409. Section 408 bears out this conclusion, for it provides the method for collecting *the tax* shown on the return, while Section 409 provides no method of collection. The germane part of Section 408 reads as follows:

> "That if *the tax* herein imposed is not paid on the *due date* thereof, the Collector shall, upon instructions from the Commissioner, proceed to collect *the tax* under the provisions of general law, or commence appropriate proceedings in any court of the United States * * * to subject the property of the decedent to be sold under the judgment or decree of the court."

It can readily be seen that the provisions for collecting "the tax" (the one shown on the return) and enforcing the lien imposed by Section 409 are different from those provided for "an additional amount of tax." This would seem conclusive of the soundness of our claim that when "the tax" shown on the return was paid, the lien under Section 409 did not take effect or was discharged. Had the 1921 Act continued in force until the deficiency herein at issue had been determined, the Commissioner would have been compelled to find an additional tax under Section 407 of the 1921 Act, just as he determined a deficiency in tax in this case under Sections 307 and 308 (a) of the

1926 Act. (The successors to Section 407.) Also, he would have been compelled to resort to Section 407 to collect the "additional tax," for Section 408 would not have afforded him relief.

Certainly it is far-fetched to say that Section 409 contemplated an enduring lien to cover "additional taxes" when Section 407 provides a special lien for "additional taxes." To say that, is to say that Congress provided two liens for an "additional tax," which is infrequent, while it provided only one lien for "the tax" returned, which occurs in every estate. Yet that is what appellee contends for and what the Court has decided.

III. THE DISTRAINT HEREIN SOUGHT TO BE ENJOINED HAS NO RELATION TO THE LIEN PROVISIONS OF THE REVENUE ACT OF 1921 OR THE LIEN PROVISIONS OF ANY ACT OTHER THAN SECTIONS 307 AND 308 OF THE 1926 ACT.

The warrant of distraint in this case and the assessment under the authority of which it was issued resulted from the judgment of the Board of Tax Appeals. (*Rosenberg v. Commissioner,* 14 B. T. A. 1340.) No warrant of distraint to enforce any lien was ever issued, nor is the present case predicated on any warrant of distraint other than the one issued on the assessment made under the determination of the Board of Tax Appeals. (R. 12.)

The Board has no jurisdiction to review estate taxes as returned, but can only review "additional taxes" or a "deficiency in taxes" found by the Commissioner after the estate tax return has been filed. (Title X,

Section 904, of the Revenue Act of 1926; Sections 306, 307 and 308 of the same Act.) No proceedings before the Board may be maintained to enforce *the tax* shown on the return, because no grant of power to review that tax has been made by Congress. (Section 1000, Revenue Act of 1926, Section 904.)

If the Commissioner now has a right of election to ignore the proceedings before the Board of Tax Appeals and the right to rely upon Section 409 of the Revenue Act of 1921 and its present counterpart, Section 315 of the 1926 Act, his assessment and appellee's notice and demand for payment and the warrant of distraint made under the decision of the Board are voided by the election and he is without remedy. He must either abandon all attempt to proceed under the decision of the Board, which he seems to have done with the approval of the Court, or concede that his present claim is beyond power of collection.

The decision of the Board of Tax Appeals in *Rosenberg v. Commissioner* (supra) is either void or effective. Nowhere in the Revenue Acts of 1924, 1926, 1928 or 1932, is the Commissioner given power to declare a decision of the Board of Tax Appeals void or ineffective, therefore, such decision must be effective. The decision determines a liability for a "deficiency in tax," not a liability for "the tax." The Commissioner inaugurated the proceeding before the Board by mailing a notice of deficiency to the estate and it responded thereto by filing a petition on appeal. (R. 11.) Now, by attempting to assert a lien for "the tax" under Section 409 of the Revenue Act

of 1921, he is arbitrarily violating the decision of the Board and attempting to seize and sell the property of petitioners without shadow of law to support him in order to avoid injunction, and the Court's decision upholds this arbitrary action by refusal to grant the injunction sought.

The present warrant of distraint was issued under the apparent authority of Section 308(b) of the Revenue Act of 1926, because it is that section which requires assessment and notice and demand from the Collector for a "deficiency" or "additional tax". Without assessment and notice and demand for payment (all of which were made against the estate in this case (R. 11, 12)), without resort to that section no distraint warrant could have issued against the estate.

As the decision of this Court appears to interpret the law, any distraint warrant issued for any kind of a tax may be utilized to distrain the property of a person other than the taxpayer to whom the warrant is addressed for a tax liability of a different classification. If respondent is to seize and sell appellants' property under the warrant of distraint now outstanding on the assertion that a lien continues under Section 409 of the 1921 Act, he must proceed under Section 408 of that Act, or its successor Section 314 of the 1926 Act. These two sections provide the method of collection to enforce the lien provided by Section 409 of the 1921 Act and Section 315 of the 1926 Act, and both provide that "the Collector shall, upon instruction from the Com-

missioner, proceed to collect the tax under the provisions of general law." He may not proceed to collect the erroneous refund which was included in the "deficiency" determined under the 1926 Act, hence the 1921 Act provides no lien or method of collection for an erroneous refund, nor does Section 315 of the 1926 Act provide for such a lien.

The general law is found in the revised statutes. R. S. Section 3182 (26 U. S. C. A. Sec. 102) requires the Commissioner to assess the tax and deliver the assessment list to the Collector. This he has not done under Section 409 of the 1921 Act. R. S. Section 3184 (26 U. S. C. A. Sec. 104) requires the Collector to give notice and make demand on the taxpayer within ten days after receiving the assessment list from the Commissioner. This has not been done, because no proper assessment has been made to provide for a demand or notice of sale in accord with the section. Unless these two preliminaries have been complied with, no legal warrant of distraint may issue or seizure and sale made. Appellee has not resorted to the provisions of general law under Section 408 of the 1921 Act or 314 of the 1926 Act, and his right to so proceed is now barred by Section 1109 of the Revenue Act of 1926.

IV. CONCLUSION.

The decision of this Court, in denying injunctive relief, has failed to consider the only issue presented to it by the pleadings, i. e. May the Collector seize

and sell appellants' property under a warrant of distraint addressed to the estate under proceedings had only against the estate, when such proceedings were instituted and said warrant issued long after the estate had been distributed and when no transferee liability has ever been determined against appellants? Excepting the portion of the decision denying the exclusive right for a determination of transferee liability under Section 316 of the 1926 Act, the decision is predicated on issues not presented to the Court by the record and the denial of the injunction is based on alleged possible situations, which were raised in appellee's brief, upon which no action has been attempted by the Collector and which, therefore, are not subject to attack or moot decision.

On the actual issue, appellee has conceded that appellants are entitled to injunctive relief, regardless of Section 3224 Revised Statutes. (See, Appellee's Brief, pp. 33, 34.) In addition to that concession, the appellants are entitled to injunction under Section 316 of the Revenue Act of 1926, regardless of the Court's determination that Section 316 does not create an exclusive remedy to recover from transferees. Section 316 of the 1926 Act provides a remedy to which the Commissioner may resort for determination of a transferee liability. If he does not elect that remedy, the Collector is barred from assessment, collection and distraint against a transferee, for his only alternative remedy is one before a Court and collection under judgment of the Court is by judgment lien, after entry of judgment, and not by statutory lien.

It is respectfully submitted that a rehearing of this proceeding should be granted both in justice to the Court and to appellants.

Dated, San Francisco,
July 19, 1933.

Respectfully submitted,
ADOLPHUS E. GRAUPNER,
Attorney for Appellants and Petitioners.

CERTIFICATE OF COUNSEL.

I hereby certify that I am counsel for the appellants and petitioners in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is made in good faith and is not interposed for delay.

Dated, San Francisco,
July 19, 1933.

ADOLPHUS E. GRAUPNER,
Attorney for Appellants and Petitioners.